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Report of the Subcommittee on First Amendment and Land Use

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Report of the Subcommittee on First Amendment and Land-Use Law

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I. Introduction[1]

IN RECENT YEARS, there has been a marked expansion in the types of uses, both commercial and nonprofit, that challenge land-use regulations on First Amendment grounds. This expansion is occurring for two reasons. First, "land use and the first amendment" is a developing area in the law; it has been only fifteen years since the Supreme Court first ruled on a case "in which the interests in free expression protected by the First and Fourteenth Amendments have been implicated by a municipality's commercial zoning ordinance."[2] While the Court has addressed zoning controls on adult businesses,[3]

1. Professor Weinstein prepared Sections I through V of the Subcommittee Report. Professor Zeigler and Kathryn Huseman, a second year law student at the University of Denver, prepared Section VI of the Subcommittee Report.

2. Young v. American Mini Theatres, Inc., 427 U.S. 50, 76 (1976) (Powell, J., concurring) (upholding Detroit's "anti skid row" ordinance that required the dispersion of adult entertainment businesses).

3. In addition to *Young*, the Court has considered three further challenges to adult zoning ordinances: FW/PBS, Inc. v. City of Dallas, 110 S. Ct. 596 (1990) (striking down the licensing provisions of a comprehensive adult entertainment zoning and licensing ordinance); City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986) (upholding a "concentration" ordinance that limited adult businesses to a 520-acre area comprising approximately 5% of the city); Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) (striking down a prohibition on all live entertainment).

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signs and billboards,[4] and newsracks,[5] it has not yet decided a case involving a challenge to zoning or historic preservation ordinances based on the religion clauses of the First Amendment.[6] The first federal appeals court decisions in such cases came only in 1983 (zoning)[7] and 1990 (historic preservation).[8] As is typical of developing areas in the law, litigants are encouraged to bring cases because the law is unsettled and they hope to create significant new rights.

Second, a number of societal factors have coalesced to create a greater potential for conflict when government regulates the use of land. In part, this is occurring simply because we are an increasingly diverse society. Consider, for example, a recent Fifth Circuit case,[9] involving a mosque in Mississippi, which illustrates one aspect of our increasing diversity: the recent appearance in communities across the nation of all sizes of religious groups—such as Muslims, Mormons, Seventh Day Adventists, Jehovah's Witnesses, and Hasidic Jews—that have

4. In two cases involving free speech challenges to zoning controls on signs and billboards, the Court ruled that content-neutral controls that do not favor commercial over noncommercial expression and which advance legitimate governmental interests in aesthetics and traffic safety are valid. *See* Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

5. In City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988), the Court struck down a municipal ordinance that limited newspaper vending machines (newsracks) to locations on public property in commercial districts, and established licensing, design-review, and insurance requirements. However, since the case involved a facial challenge to the regulations and the Court, after finding that the ordinance impermissibly gave the mayor unfettered discretion to deny or condition a permit, remanded the case to the Sixth Circuit to decide whether the unconstitutional provisions could be severed. The ruling provides no guidance on whether the locational, licensing fee, and insurance requirements pass constitutional muster.

6. The First Amendment contains two separate guarantees of religious freedom: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; . . . ." Both the "Establishment" and "Free Exercise" Clauses have been made applicable to the states by the Fourteenth Amendment. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940) (Free Exercise Clause); Everson v. Board of Educ., 330 U.S. 1 (1947) (Establishment Clause).

7. *See* Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303 (6th Cir. 1983); Grosz v. City of Miami Beach, 721 F.2d 729 (11th Cir. 1983).

8. Rector of the Vestry of St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1103 (1991).

9. *See* Islamic Ctr. v. City of Starkville, 840 F.2d 293 (5th Cir. 1988), which held that the Board of Aldermen of Starkville, Mississippi, violated the Free Exercise Clause when it denied a special exception to a group of Muslim students at Mississippi State University who sought to renovate a property for use as a student residence and mosque. *Id.* at 294. The court concluded that the board had denied the Islamic Center a special exception for reasons other than the asserted considerations of traffic control and public safety and that it applied different standards to approving a mosque than it had adopted for Christian institutions. *Id.* at 302.

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not traditionally been in the mainstream of American religious life. Another, and very different, example of increasing social diversity has been the spread of "adult businesses," which once were limited to the "red light" districts of large cities, and to the neighborhoods and central business districts of large and small communities alike.

Other factors besides increasing social diversity have given rise to increased conflict between land-use controls and the First Amendment. The near universal acceptance of aesthetics as a valid governmental objective in the past two decades has led to greater local efforts to control signs. The adoption of local historic preservation ordinances can create conflict because many of the significant historical structures in any community will be churches and synagogues. Finally, the increasingly litigious nature of society generally also contributes to the growing conflict.

In this report, we review a number of significant state and federal cases in each of the areas noted above: regulation of newsracks; the application of zoning, eminent domain, and historic preservation ordinances to religious institutions; sign controls; and zoning regulation of adult businesses. We first discuss the Supreme Court's recent decision in *Barnes v. Glen Theatre*[10] which, although not a land-use case, has significant implications for the manner in which local governments choose to regulate adult businesses.

II. *Barnes v. Glen Theatre*

Barnes v. Glen Theatre involved First Amendment challenges by two adult businesses in South Bend, Indiana, to the enforcement of Indiana's public indecency statute which barred totally nude dancing.[11] One is the Kitty Kat Lounge, a bar that presents "go-go dancing," and would like to present totally nude dancing, but the Indiana law regulating public nudity requires that dancers wear "pasties" and a "G-string."[12] The other, the Glen Theatre, is an adult business that offers books, magazines, movie showings, and live entertainment, consisting of nude and

10. 111 S. Ct. 2456 (1991).

11. *Id.* at 2458.

12. The Indiana statute declares that anyone who knowingly or intentionally appears in a state of nudity in a public place commits "public indecency," a Class A misdemeanor. "Nudity" is defined as "the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state." IND. CODE § 35-45-4-1 (1988).

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semi-nude female dancers, in an enclosed "bookstore."[13] After a lengthy journey through the federal courts,[14] a majority of the Seventh Circuit, sitting en banc, concluded that non-obscene nude dancing performed for entertainment is expression protected by the First Amendment, and that the public indecency statute was an improper infringement of that expressive activity because its purpose was to prevent the message of eroticism and sexuality conveyed by the dancers.[15]

The Supreme Court reversed the judgment of the court of appeals,[16] but failed to reach a single rationale for its decision.[17] Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy, delivered the opinion of the Court upholding the statute, with Justices Scalia and Souter writing separate concurring opinions. Justice White, joined by Justices Marshall, Blackmun, and Stevens, dissented.

Rehnquist's opinion acknowledged that nude dancing is expressive conduct protected by the First Amendment, but found that it was only "marginally" within the amendment's "outer perimeters."[18] Rehnquist argued that the statute was not aimed at the erotic message conveyed by the dancing but sought to ban all public nudity, whether or not it is combined with expressive activity.[19] Thus, the correct way to view the statute was as a form of "time, place or manner" restriction

13. *Barnes*, 111 S. Ct. at 2459.

14. *See* Glen Theatre, Inc. v. Pearson, 802 F.2d 287 (7th Cir. 1986); Glen Theatre, Inc. v. Civil City of South Bend, 695 F. Supp. 414 (N.D. Ind. 1988); Miller v. Civil City of South Bend, 887 F.2d 826 (7th Cir. 1989).

15. Miller v. Civil City of South Bend, 904 F.2d 1081 (7th Cir. 1990).

16. *Barnes*, 111 S. Ct. at 2463.

17. In its decisions involving land use and the First Amendment, the Court has twice been fragmented when it initially considered a particular issue, but formed a consensus on a later case. In 1976, the Court split 4–1–4 in Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), its first adult zoning case, but a decade later upheld the ordinance in City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986), with a 6–3 split. Similarly, the Court's first sign regulation decision in Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981), split 4–2–1–1–1: a plurality opinion by Justice White, joined by three others; a concurring opinion by Justice Brennan, joined by Justice Blackmun; and three separate dissenting opinions. Three years later, in Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984), there was a six-member majority that upheld the ordinance in question.

The Court appeared to follow this pattern again last term in FW/PBS, Inc. v. City of Dallas, 110 S. Ct. 596 (1990). In ruling for the first time on whether the licensing provisions of a comprehensive adult business ordinance constituted a prior restraint, the six-Justice majority, while striking down the licensing provision (*id.* at 606), split down the middle on the issue of what procedural safeguards would be required to salvage the scheme and the three dissenting Justices wrote two opinions. *See id.* at 616 (Stevens, J., dissenting); *id.* at 617 (Scalia, J., dissenting).

18. *Barnes*, 111 S. Ct. at 2460.

19. *Id.*

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which could be judged under the standards set forth in *United States v. O'Brien*.[20]

After finding that Indiana's "public indecency" statute used the state's police power to further a substantial government interest in protecting order and morality by banning public nudity,[21] Rehnquist argued that restricting nudity on moral grounds is unrelated to the suppression of free expression, relying on language in *O'Brien* rejecting an "expansive" notion of expression as any conduct intended to express an idea.[22] Rehnquist denied the contention that, while the statute's general prohibition on public nudity may be unrelated to suppressing free expression, the state, by banning nude dancing, seeks to prevent its erotic message. He argued that the state was not proscribing nudity because of the erotic message but was only "making the message slightly less graphic" by requiring dancers to wear pasties and G-strings, thereby addressing the evil it sought to prevent—public nudity.[23] It was not the dancing, with its communicative element, which the state prohibited, but public nudity, whether or not it is combined with expressive activity.[24] Finally, and no doubt with tongue in cheek,

20. *Id.* (citing United States v. O'Brien, 391 U.S. 367 (1968)). Rehnquist noted that while the "time, place or manner" test was developed for evaluating restrictions on expression taking place on public property used as a "public forum," the Court in *Renton* had applied it to conduct occurring on private property (*id.*); and then observed "that this test has been interpreted to embody much the same standards as those set forth in United States v. O'Brien." *Id.* (citing United States v. O'Brien, 391 U.S. 367 (1968)).

United States v. O'Brien, 391 U.S. 367 (1968), which "held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms" (*id.* at 376), stated a four-part test for evaluating government regulations that incidentally affect expressive activity:

> A government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

21. *Barnes*, 111 S. Ct. at 2462.

22. *Id.* at 2462–63. Rehnquist also cited City of Dallas v. Stanglin, 490 U.S. 19 (1989), in which the Court held that social "ballroom" dancing was beyond the protection of the First Amendment, for the proposition that one could find some "kernel" of expression in almost every activity, "but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *Stanglin*, 490 U.S. at 25.

However, Justice White's dissenting opinion correctly observes that *Stanglin* did not address the issue of whether social dancing was expressive activity, but rather, whether plaintiff's associational rights were violated by restricting admission to dance halls on the basis of age. *Barnes*, 111 S. Ct. at 2471 n.1 (White, J., dissenting).

23. *Id.* at 2463.

24. *Id.*

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Rehnquist found that the public indecency statute was narrowly tailored to achieve its end, since the requirement that dancers wear at least pasties and a G-string was the "bare minimum" necessary to achieve the state's purpose.[25]

Justices Scalia and Souter concurred in the judgment of the Court upholding the Indiana statute, but wrote separate concurring opinions to state their differing views on the reasons why it should be upheld. Scalia, who viewed the public indecency law as a general law regulating conduct and not specifically directed at expression, argued that the statute should not be subject to First Amendment scrutiny at all.[26]

Justice Souter provided a cautious fifth vote. While he agreed with both the plurality and dissent that the nude dancing at issue in this case is subject to a degree of First Amendment protection,[27] and agreed with the plurality's use of the *O'Brien* test,[28] he wrote separately because he viewed the justification for the statute to be not public morality, the position taken by both the plurality and Justice Scalia, but the substantial governmental interest in combating the secondary effects of adult entertainment establishments that offer nude dancing.[29] Viewed thus, his

25. *Id.*

26. Scalia placed the Indiana statute "in the line of a long tradition of laws against public nudity, which have never been thought to run afoul of [our] traditional understanding of the freedom of speech." *Id.* at 2464. Noting that "virtually *every* law restricts conduct, and virtually *any* prohibited conduct can be performed for an expressive purpose—if only expressive of the fact that the actor disagrees with the prohibition" (*id.* at 2465)—Scalia dismissed the idea "that every restriction of expression incidentally produced by a general law regulating conduct pass normal First Amendment scrutiny" (*id.*) or be justified by an important or substantial government interest: where a judicial inquiry shows that the purpose of the law is not to suppress communication, then "that is the end of the matter so far as First Amendment guarantees are concerned." *Id.* at 2467.

Scalia found support for this position in last Term's decision on the Free Exercise Clause, Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595 (1990) (holding that general laws not specifically targeted at religious practices do not require heightened First Amendment scrutiny even though they diminish some people's ability to practice their religion). In fact, he found even greater reason to apply this approach to the regulation of expressive conduct since

> relatively few can plausibly assert that their illegal conduct is being engaged in for religious reasons; but almost anyone can violate almost any law as a means of expression. In the one case, as in the other, if the law is not directed against the protected value (religion or expression) the law must be obeyed.

Barnes, 111 S. Ct. at 2467.

We note, however, that the majority view in *Smith* has been the subject of intense criticism, *see, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990). *But see* William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991).

27. *Barnes*, 111 S. Ct. at 2463.

28. *Id.* at 2468-69.

29. *Id.*

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analysis under the *O'Brien* test found support in the *Young* and *Renton* decisions which upheld zoning restrictions on the location of adult businesses in order to control their secondary effects.[30]

The fact that Justice Souter's concurring opinion relies on a secondary effects justification for the statute is an extremely important point of departure from the Rehnquist and Scalia opinions, which rely on public morality to justify the enactment, because his opinion confines public decency laws, as applied to nudity in the performing arts, to the single context of adult entertainment absent evidence of secondary effects.[31]

The four dissenters, in an opinion authored by Justice White, argued that the statute served different purposes when applied to ban nudity in such public places as beaches and parks than when applied to ban nude dancing in adult establishments.[32] In the former case, the purpose is to protect the public from offense.[33] In the latter case, since the viewers are adults who have willingly paid to be in attendance, the purpose is to protect the viewers from what the state believes is the harmful message that nude dancing communicates.[34] Thus, in White's view, Rehnquist's argument that the state is not "prohibiting nudity because of the erotic message conveyed by the dancers" but only because of the nudity, is "transparently erroneous" because the nudity is itself an expressive component of the dance, not merely incidental "conduct."[35]

Since the statute directly regulates expressive activity, White argued, it may only be justified by a compelling state interest that is narrowly

30. *Id.* at 2469–70.

31. Souter observed:

> It is difficult to see, for example, how the enforcement of Indiana's statute against nudity in a production of "Hair" or "Equus" somewhere other than an "adult" theater would further the state's interest in avoiding harmful secondary effects, in the absence of evidence that expressive activity outside the context of *Renton*-type adult entertainment was correlated with such secondary effects."

Id. at 2470 n.2 (Souter, J., concurring).

32. *Barnes*, 111 S. Ct. at 2473 (White, J., dissenting).

33. *Id.*

34. *Id.*

35. *Id.* at 2473–74.

> It is only because nude dancing performances may generate emotions and feelings of eroticism and sensuality among the spectators that the State seeks to regulate such expressive activity, apparently on the assumption that creating or emphasizing such thoughts and ideas in the minds of spectators may lead to increased prostitution and the degradation of women. But generating thoughts, ideas, and emotions is the essence of communication. The nudity element of nude dancing cannot be neatly pigeonholed as mere "conduct" independent of any expressive component of the dance.

Id. at 2474 (footnote omitted).

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drawn.[36] But rather than narrowly tailoring a statute to address prostitution and associated evils,[37] or using its authority under the Twenty-First Amendment to regulate nude dancing in bars,[38] Indiana impermissibly chose to ban an entire category of expressive activity.

Barnes is an important case for several reasons. First, it exemplifies the profound effect Justice Brennan's resignation, and the subsequent appointment of Justice Souter, has had on the Court; there can be little doubt that there would have been a majority to strike down the statute were Brennan still on the Court.[39] With the announcement of Justice Marshall's retirement, and expected appointment of another conservative to the Court, there will soon be six potential votes on the Court to support further incursions into areas of expression Justice Rehnquist views as being on the "margin" of the First Amendment.

Second, the case has loosed a troika of sinister arguments into First Amendment analysis, ranging from Scalia's denial that the statute is directed at expression,[40] through Souter's secondary effects argument,[41] to Rehnquist's notion of a hierarchy of noncommercial speech, with nude dancing only "marginally" at the "outer perimeters" of First Amendment protection.[42] These views may well be applied to other forms of expression viewed as being on the margins of the First Amendment.[43] By contrast, Justice White's position implicitly acknowledged that all expression not judged to be wholly outside the First Amendment should receive the full protection of its constitutional guarantees to guard against "marginal" forms of expression, such as nude dancing, being deemed unworthy by the courts or legislature.[44]

36. *Id.*

37. *See, e.g.*, Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986); California v. LaRue, 409 U.S. 109 (1972).

38. *See* Newport v. Iacobucci, 479 U.S. 92 (1986) (per curiam); New York State Liquor Auth. v. Bellanca, 452 U.S. 714 (1981) (per curiam); *LaRue*, 409 U.S. 109.

39. Justice Brennan argued strongly against government efforts to regulate expressive activity as can be seen in his dissenting opinions in Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (Brennan, J., dissenting); and City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986) (Brennan, J., dissenting).

40. *See Barnes*, 111 S. Ct. at 2463 (Scalia, J., concurring).

41. *See id.* at 2468–71 (Souter, J., concurring).

42. *See id.* at 2460 (Rehnquist, J.).

43. Rehnquist's view is reminiscent of that espoused by Justice Stevens' plurality opinion in Young v. American Mini Theaters, 427 U.S. 50 (1976), where he justified Detroit's differing treatment of adult and non-adult films by placing pornography on a lower constitutional level than other forms of expression. *See id.* at 70–71.

44. That the performances in the Kitty Kat Lounge may not be high art, to say the least, and may not appeal to the Court, is hardly an excuse for distorting and ignoring settled [First Amendment] doctrine. In the words of Justice Harlan, "it is largely because government officials cannot make principled

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Third, the Court has given the green light to state and local governments to crack down on nude dancing, if they so choose, despite the array of regulatory tools government already possesses to regulate adult businesses.[45] Further, state and local governments may now try to ban other forms of erotic expression under the rationale advanced in *Barnes*.

Some observers, however, view the Court's ruling as a relatively narrow one in the sense that it focused so particularly on nude dancing in adult entertainment establishments and did not reach out to address the First Amendment issues raised by an application of such statutes to nudity in other forms of artistic expression.[46] Justice Souter specified that his analysis would not apply to nudity in legitimate theater absent evidence of secondary effects, and only Justice Scalia would deny any constitutional protection to nude dancing.[47] Still, given the history of

decisions in this area that the Constitution leaves matters of taste and style so largely to the individual."

Barnes, 111 S. Ct. at 2474 (quoting Cohen v. California, 403 U.S. 15, 25 (1971)).

45. These include: (1) locational restrictions based on *Young* and *Renton*; (2) using nuisance statutes to close down adult businesses that foster prostitution, gambling, or drug use (*see, e.g.*, O'Connor v. City of Denver, 894 F.2d 1210 (10th Cir. 1990); Hvamstad v. Suhler, 727 F. Supp. 511 (D. Minn. 1989)); (3) requiring owners or operators of adult businesses to obtain a license, so long as such ordinances meet the procedural safeguards set out in FW/PBS, Inc. v. City of Dallas, 110 S. Ct. 596 (1990); and (4) using the authority granted states under the Twenty-First Amendment to regulate the conditions under which the sale of alcoholic beverages occurs. *See supra* note 38. *But see* Bellanca v. New York State Liquor Auth., 429 N.E.2d 765 (N.Y. 1981) (holding that the state's police power, though possibly not limited under the U.S. Constitution due to the Twenty-First Amendment, is limited by the protection of free expression guaranteed by the state constitution); Harris v. Entertainment Sys., Inc., 386 S.E.2d 140 (1989) (same). *Contra Bellanca*, 429 N.E.2d at 773–75 (Jasen, J., dissenting).

46. The *New York Times* reported that civil liberties lawyers, who feared that the Court might "apply a sweeping analysis that could call into question constitutional protections for many forms of artistic expression" were relieved by the Court's approach. N.Y. TIMES, June 22, 1991, at 1 (national ed.).

47. This marks the second time that Justice Scalia has opined that sexually oriented adult entertainment businesses should not receive the protection of the First Amendment. In *FW/PBS, Inc. v. City of Dallas*, 110 S. Ct. 596 (1990) (Scalia, J., concurring in part and dissenting in part), he argued that while individual works of pornography are always protected, businesses that specialize in pornography that is sexually explicit in more than a minor degree are engaged in an activity, the "sordid business of pandering" that is akin to obscenity, and are not constitutionally protected. *Id.* at 620.

Justice Scalia cited Ginzburg v. United States, 383 U.S. 463 (1966), as authority for his position (*see FW/PBS*, 110 S. Ct. at 620), but Justice Stevens took issue with this, contending that *Ginzburg*, which was decided before the Court extended First Amendment protection to commercial speech, is no longer good law in light of the Court's ruling in Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). *FW/PBS*, 110 S. Ct. at 617 (Stevens, J., concurring in part and dissenting in part).

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local governments' hostility toward adult businesses,[48] we should not be surprised by attempts to ban additional forms of pornography under the rationale advanced in *Barnes*.

III. Zoning Regulation of Adult Businesses

Prior to this year's *Barnes* decision, the Supreme Court had ruled four times on the constitutionality of municipal regulations governing the location or operation of sexually oriented "adult businesses," beginning with its *Young* decision in 1976.[49] These cases established that municipalities could single out adult businesses for special regulatory treatment in the form of "time, place, and manner" regulations that restricted the locations where such businesses could operate, so long as the municipality could show it had a substantial governmental interest in regulating such businesses and the regulations still allowed for reasonable alternative avenues of communication.[50] However, when cities attempt to exclude all adult businesses, whether through an outright ban, overly restrictive locational restrictions or by giving officials undue discretion over special use or licensing provisions, the ordinance will be struck down.[51]

Before turning to a discussion of recent cases that apply these rules, there is an interesting 1989 decision of the California Supreme Court

48. *See* Alan C. Weinstein, *The* Renton *Decision: A New Standard for Adult Business Regulation*, 32 WASH. U.J. URB. & CONTEMP. L. 91, 98–101 (1987) (examples of local government efforts to suppress adult businesses).

49. *See supra* notes 3, 4.

50. *See infra* notes 69–71 and accompanying text.

This position was first advocated in Justice Powell's concurring opinion in Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (Powell, J., concurring). Powell argued that the appropriate test for analyzing Detroit's adult entertainment zoning was the four-part test of United States v. O'Brien, 391 U.S. 367, 377 (1968), which is applied when governmental regulation of non-speech interests (e.g., the "secondary effects" of adult businesses, such as neighborhood deterioration) incidentally affects interests related to speech (e.g., the dissemination of adult films and books). *Young*, 427 U.S. at 79; *see supra* note 26.

In *Renton*, the majority held that the ordinance should appropriately be analyzed as a form of time, place, and manner regulation (City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 46 (1986)); however, rather than utilizing *O'Brien*'s four-part test, the Court adopted a two-part test that asked whether the ordinance was designed to serve a substantial governmental interest and allowed for reasonable alternative avenues of communication. *See id.* at 41–55. Interestingly, the Court reversed the decision of the Ninth Circuit, which had analyzed the ordinance under *O'Brien* (*see id.* at 46), and found that the city had failed to demonstrate a substantial governmental interest and had not proved that the ordinance was unrelated to the suppression of speech. *See id.* at 41–55.

51. *See* cases cited *infra* notes 59–66; *see also* Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981); FW/PBS, Inc. v. City of Dallas, 110 S. Ct. 596 (1990).

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that addresses the threshold issue of what constitutes an adult business. In *People v. Superior Court*,[52] the City of Long Beach had adopted a dispersion-style ordinance modeled on the Detroit ordinance upheld in *Young*.[53] The operators of a two-screen theater that exhibited adult films on one of the screens were charged in misdemeanor complaints with unlawfully establishing an adult entertainment business in violation of the locational restrictions of the ordinance each time they exhibited an adult film.[54] The court was unanimous in finding this "single use" standard to be constitutionally infirm,[55] but split 4-3 on the more critical issue of the appropriate constitutional standard by which to define an adult use.

The majority, ruling that the "preponderance" standard first announced by the court of appeal in *Pringle v. City of Covina*,[56] is not constitutionally compelled, replaced it with a new test: "the regular and substantial course of conduct" standard.[57] In the majority's view, this new standard allows California municipalities "greater flexibility" in zoning adult theaters while forbidding the use of the zoning power as a "pretext for suppressing expression."[58] While concurring with the judgment of the court regarding the impropriety of a "single showing" rule, the dissenting judges strongly criticized the majority for both

52. 774 P.2d 769 (Cal. 1989).

53. *Id.* at 772.

54. *Id.* Each of the numerous counts in the indictment referred to the exhibition of an X-rated movie on a particular day.

55. *Id.* at 775. The California Supreme Court cited with approval an earlier Ninth Circuit case, Tollis, Inc. v. San Bernardino County, 827 F.2d 1329 (9th Cir. 1987), which held that defining a theater as an "adult use" based on a single showing of an adult movie was "unconstitutional in the absence of evidence 'that a single showing . . . would have any harmful secondary effects on the community.' " *Id.* at 771–72 (quoting Tollis v. San Bernardino County, 827 F.2d 1329, 1333 (9th Cir. 1987)).

56. 171 Cal. Rptr. 251 (1981). In this case, the court of appeal held that an adult entertainment zoning ordinance cannot be enforced against a theater's exhibition of adult films unless a "preponderance" (meaning "more often than not") of the adult films shown by the theater "have as their dominant theme the depiction of the ordinance's enumerated sexual activities. . . ." *Id.* at 257 (citation omitted).

57. *Superior Court*, 774 P.2d at 771. The court described the new standard thus: "[C]ities may zone the location of theaters that show, on a regular basis, films characterized by an emphasis on the 'specified sexual activities' or 'specified anatomical areas' identified in the ordinance where such films constitute a substantial portion of the films shown or account for a substantial part of the revenues derived from the exhibition of films . . . ." *Id.*

58. *Id.* at 777 (quoting Young v. American Mini Theatres, Inc., 427 U.S. 50, 84 (1976)). The majority argued that its "regular and substantial course of conduct" test would provide a construction that is "rationally tailored to support its asserted purpose of preventing neighborhood blight" without allowing Long Beach the opportunity to use its zoning power improperly to suppress freedom of expression. *Id.*

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"judicial legislating" and doing violence to free speech principles.[59]

In recent adult zoning cases applying the criteria established by the Supreme Court in *Young v. American Mini Theatres, Inc.*,[60] *Schad v. Borough of Mount Ephraim*,[61] *City of Renton v. Playtime Theaters, Inc.*,[62] and *FW/PBS, Inc. v. City of Dallas*,[63] courts have struck down ordinances because they unduly restricted access to adult businesses,[64] were unconstitutionally vague,[65] created an unlawful prior restraint,[66] or failed to follow statutory notice requirements prior to adopting the ordinance;[67] while upholding ordinances that were properly based on controlling the secondary impacts of adult businesses,[68] did not overly restrict the sites available for adult businesses,[69] and provided a reason-

59. Justice Mosk (*see id.* at 779 (Mosk, J., concurring in part and dissenting in part)), and Justice Kennard, with whom Justice Broussard concurred (*see id.* at 783 (Kennard, J., concurring in part and dissenting in part)), each wrote opinions concurring in the judgment but dissenting as regards the court's replacing the *Pringle* standard.

60. 427 U.S. 50 (1976).

61. 452 U.S. 61 (1981).

62. 475 U.S. 41 (1986).

63. 110 S. Ct. 596 (1990).

64. In Alexander v. City of Minneapolis, 713 F. Supp. 1296 (D. Minn. 1989), amendments to the city's zoning ordinance enacted in November 1986, shortly after the *Renton* decision, were held unconstitutional because the locational restrictions would result in the closing of several existing adult businesses with no reasonable opportunity to relocate. The court noted that the amendments would shutter several long-standing adult businesses—some had been in existence for up to 25 years (*id.* at 1304)—while restricting both new and relocating adult businesses to 0.54 % of the total land area of the city. *Id.* at 1305 n.11. While this area was much more limited than the 5.0% made available to adult businesses in the *Renton* case, that fact alone was not dispositive; rather, it was the fact that no reasonable opportunities for relocation were available in that area. *Id.* at 1305.

This case marked the second time in six years that the city's efforts to regulate the location of adult businesses had been found unconstitutional. In Alexander v. City of Minneapolis, 698 F.2d 936 (8th Cir. 1983), the court struck down a similar ordinance which reduced permissible sites for adult businesses by two-thirds.

65. *Alexander*, 713 F. Supp. at 1302.

66. Gascoe, Ltd. v. Newtown Township, 699 F. Supp. 1092 (E.D. Pa. 1988) (conditional use denied to video store that intended to rent and sell adult films as approximately 10 to 25% of its business on grounds that such films are "offensive"); Landover Books v. Prince George's County, 566 A.2d 792 (Md. App. 1989); 11126 Baltimore Blvd. v. Prince George's County, 684 F. Supp. 884 (Md. Ct. Spec. App. 1988) (overbroad discretion vested in city officials who administered a special exception requirement for adult bookstores).

67. Southern Entertainment Co. v. City of Boynton Beach, 736 F. Supp. 1094 (S.D. Fla. 1990).

68. U.S. Partners Fin. Corp. v. Kansas City, 707 F. Supp. 1090 (W.D. Mo. 1989) (facts indicated that the city's pursuit of its zoning interests through denial of rezoning for adult entertainment business was unrelated to the suppression of free expression).

69. Centaur, Inc. v. Richland County, 392 S.E.2d 165 (S.C. 1990) (adult business had at least 16 sites to which it could relocate); Bonnell, Inc. v. Board of Adjustment, 791 P.2d 107 (Okla. Ct. App. 1989) (upholding ordinance that provided 44 individual locations in an 1100-acre area which met all the conditions for an adult entertainment use under the ordinance); International Eateries v. Broward County, 726 F. Supp. 1568 (S.D. Fla. 1989) (adult business could relocate to 26 potential sites in the county without violating ordinance).

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able amortization period, under the particular circumstances of the case, for nonconforming adult uses.[70]

Finally, we also note the numerous recent decisions that have considered regulations requiring adult bookstores and theaters that feature "viewing booths" to remove the booths' entry doors so as to keep the booths open to public view.[71] These "open door" requirements, which are not zoning regulations but rather health ordinances designed to decrease illicit sexual activity and/or the spread of AIDS,[72] have been upheld as valid "time, place and manner" restrictions on expression[73] that do not implicate patrons' privacy rights.[74] However, such ordinances may still be invalid, in part, if they violate other constitutional safeguards.[75]

IV. Regulation of Newsracks

The Supreme Court's 1988 decision in *City of Lakewood v. Plain Dealer Publishing Co.*[76] established that municipal regulation of newsracks raises First Amendment issues, and that a newsrack licensing scheme

70. *Centaur*, 392 S.E.2d 165 (upholding two-year amortization provision and noting several cases that upheld amortization periods varying from ninety days to over five years); PA Northwestern Distrib., Inc. v. Zoning Hearing Bd., 555 A.2d 1368 (Pa. Commw. Ct. 1989) (ninety-day amortization period upheld where adult business could relocate and improvements to current location could be used by another commercial entity); *Bonnell*, 791 P.2d 107 (five-year amortization period allowed adult business a reasonable period of time to come into compliance with ordinance or relocate).

71. *See, e.g.*, Doe v. City of Minneapolis, 898 F.2d 612 (8th Cir. 1990); Berg v. Health & Hosp. Corp., 865 F.2d 797 (7th Cir. 1989); Bamon Corp. v. City of Dayton, 730 F. Supp. 80 (S.D. Ohio 1990); Postscript Enter. v. City of Bridgeton, 699 F. Supp. 1393 (E.D. Mo. 1988); Suburban Video v. City of Delafield, 694 F. Supp. 585 (E.D. Wis. 1988); Adult Entertainment Ctr. v. Pierce County, 788 P.2d 1102 (Wash. Ct. App. 1990).

72. Many of the cases cited *supra* note 71 document the extent to which viewing booths with closed doors may be used for illicit sexual activities by facilitating sexual activity either between two persons occupying a single booth or by persons in adjoining booths by means of a so-called "glory hole" in a wall shared by the booths.

73. *See, e.g.*, *Berg*, 865 F.2d 797; *Adult Entertainment Ctr.*, 788 P.2d 1102.

74. *See Berg*, 865 F.2d 797 (rejecting arguments that patrons have a constitutional right to view adult films behind closed doors in a public establishment); *Adult Entertainment Ctr.*, 788 P.2d 1102 (patrons have no constitutional right to engage in sexual activity, including masturbation, behind closed doors in a public establishment); *Bamon*, 730 F. Supp. 80 (patrons have no constitutional right to view sexually explicit, nonobscene material in private booth of public business; *Suburban Video*, 694 F. Supp. 585 (same).

75. For example, in *Suburban Video*, the court invalidated those portions of the ordinance's adult business licensing scheme that required applicants to supply large amounts of personal information which had no relationship to the ordinance's stated purpose of fighting the spread of AIDS, finding that these provisions were an unjustified prior restraint on expression and violated owners' and employees' right to privacy. *Suburban Video*, 694 F. Supp. at 592.

76. 486 U.S. 750 (1988).

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cannot grant public officials unfettered discretion in granting or conditioning licenses, but failed to provide answers to other constitutional questions surrounding municipal regulation of newsracks.[77] The cases discussed below address issues not reached in *Lakewood*, such as the validity of locational restrictions, permit fees, and insurance requirements.[78]

Two recent federal cases involved the same plaintiff, Harlan Jacobsen, who publishes two "singles" newspapers, *Solo RFD* and *Singles Scene*, which are distributed through newsracks in several midwestern states. In *Jacobsen v. Harris*,[79] the Eighth Circuit upheld a Lincoln, Nebraska, newsrack ordinance that featured many of the elements the Court had declined to review in its *Lakewood* decision.[80] The court found (1) that the ordinance's permit fee was valid because it covered only the administrative costs associated with processing the permit[81]

77. In this 4–3 decision, the majority invalidated the Lakewood newsrack licensing scheme because it vested unbridled discretion in a government official to grant or deny licenses for conduct protected by the First Amendment. *See id.* at 770. While this holding sounds narrow and uncontroversial, the Court split on a critical underlying question: whether this ordinance regulated newspapers—and thus regulated activity protected by the First Amendment—directly or indirectly; a question that would determine whether the Plain Dealer Publishing Company could challenge the ordinance facially as a potential prior restraint.

In his majority opinion, Justice Brennan, joined by Justices Blackmun, Marshall, and Scalia, viewed the ordinance as regulating newspaper circulation, thus directly involving the First Amendment, and permitted the facial challenge to avoid the possibility of a prior restraint. *Id.* at 755 (Brennan, J.) The dissenting members of the Court, Justices White, Stevens and O'Connor, saw the ordinance as regulating only the placement of newsracks on public property, thus not regulating First Amendment activity directly, and concluded the ordinance should have been challenged on an "as applied" basis rather than facially. *See id.* at 774 (White, J., dissenting).

Because the majority found the ordinance invalid on its face due to the excessive discretion vested in the mayor, it declined to discuss the validity of other elements of the ordinance, which included license fees, design review by the city's architectural review board, and a required indemnification agreement guaranteed by a $100,000 insurance policy. *See id.* at 772. The dissent not only found that the entire ordinance passed constitutional muster, but argued that cities could ban newsracks entirely if they chose because ample alternate means of distribution were available. *Id.* at 783–84 (White, J., dissenting).

78. There have also been a number of cases involving municipal restrictions on newspaper vending machines in airports. *See, e.g.*, Gannett Satellite Info. Network v. Berger, 894 F.2d 61 (3d Cir. 1990) (standardless rule prohibiting distribution of printed or written material at Newark Airport without consent of Port Authority violated First Amendment); Chicago Tribune Co. v. City of Chicago, 705 F. Supp. 1345 (N.D. Ill. 1989) (total ban on newsracks in an airport concourse, which does not serve a significant governmental interest, justifies issuance of preliminary injunction against enforcement of ban).

79. 869 F.2d 1172 (8th Cir. 1989).

80. *Id.* at 1173–74.

81. *Id.* at 1174. On this point, the court cited its own earlier decision in another case involving this same plaintiff, Jacobsen v. Crivaro, 851 F.2d 1067 (8th Cir. 1988). *See id.*

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and (2) that the mandatory insurance requirement was reasonable because (a) the city had a legitimate interest in protecting itself from liability for injuries associated with the use of its property, and (b) there was testimony from a city official that claims arising from objects placed in the public right-of-way were made quite often.[82]

In *Jacobsen v. Petersen*,[83] however, a federal district court held that the Pierre, South Dakota, street and sidewalk nonobstruction ordinances[84] violated the First Amendment as they were applied to newsracks.[85] Analyzing the case as one where the city was using a content-neutral regulation to limit expressive activity in a traditional public forum, the district court applied a test for "time, place and manner" restrictions and found the ordinances invalid because they failed to advance the city's purported interests in traffic and pedestrian safety, and permitted undue discretion by city officials who administered the ordinance.[86]

In other reported cases involving newsracks, a Pennsauken, New Jersey, ordinance that excluded newspaper vending machines from Westfield Avenue, the city's main business street, but allowed them to be placed "in any other location" on other streets in the city and within thirty feet of Westfield Avenue on side streets that intersect with it, was upheld in *Gannett Satellite Info. Network, Inc. v. Pennsauken Township*.[87] Analyzing the ordinance as a "time, place and manner" restriction, the court found that the city was unable to prove its asserted interest in traffic safety but could show that its aesthetic interests, rooted in a desire to save a once flourishing business district from deterioration, were valid.[88] Finally, in *Sebago, Inc. v. City of Alameda*,[89] the court had little trouble in striking down an adult entertainment zoning ordinance that restricted the locations of newsracks distributing *The Spectator*, a successor to the *Berkeley Barb*, holding that the ordinance was unconstitutional on its face since it was neither content-neutral nor a narrowly drawn content-based regulation justified by a compelling state interest.[90]

82. *Harris*, 869 F.2d at 1174.
83. 728 F. Supp. 1415 (D.S.D. 1990).
84. There were two ordinances at issue. The first prohibited all obstructions on any street, road, alley or sidewalk, and the second prohibited the placement of any goods or merchandise so as to obstruct any sidewalk. *Id.* at 1417.
85. *Id.* at 1422.
86. *Id.* at 1420–21.
87. 709 F. Supp. 530 (D.N.J. 1989).
88. *Id.* at 541.
89. 259 Cal. Rptr. 918 (Cal. Ct. App. 1989).
90. *Id.* at 923–25.

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From these cases, we can derive several guidelines for municipal regulation of newsracks. While cities are free to enact content-neutral ordinances that regulate the location of newsracks, require reasonable permit or licensing fees, and contain indemnification or insurance requirements that can be justified by a uniform policy applicable to all owners of objects placed on public property, such regulation must further a valid public purpose. Courts will not simply defer to asserted municipal interests in traffic and pedestrian safety or aesthetics, but will require the city to prove the legitimacy of its asserted interests.

However, there is still no clear guidance on the issue of a total ban on newsracks. With the retirements of Justices Brennan and Marshall, only two members of the *Lakewood* majority now sit on the Court; yet Brennan's liberal opinion was joined by Justice Scalia, so it is not at all clear how the current Court would treat a ban on newsracks.

The lower federal courts have split on the issue. In *Providence Journal Co. v. City of Newport*,[91] the court found that barring newsracks from all public rights-of-way was not unconstitutional per se as a total prohibition of communicative activity because newspapers could still be distributed via newsstands and newsboys,[92] but held that the city had failed to justify its asserted significant government interest in aesthetics and facilitating the flow of pedestrian traffic.[93] By contrast, *Chicago Newspaper Publishers Ass'n v. City of Wheaton*,[94] found a total ban on newsracks in residential neighborhoods an invalid time, place, and manner regulation both because there were *not* ample alternatives to newsracks and the city had not demonstrated that it had adopted the least restrictive means available to achieve its goals of promoting auto and pedestrian safety and maintaining the residential character of its neighborhoods.[95]

V. Religious Institutions

A. *Zoning*

Prior to 1983, no federal appellate court had considered a case involving the zoning of religious institutions, such litigation was confined to state

91. 665 F. Supp. 107 (D.R.I. 1987).
92. *Id.* at 112.
93. *Id.* at 117.
94. 697 F. Supp. 1464 (N.D. Ill. 1988).
95. *Id.* at 1469–70; *see also* News & Sun-Sentinel Co. v. Cox, 702 F. Supp. 891 (S.D. Fla. 1988) (statute "attempting to prohibit commercial use of state-maintained roads was not valid time, place or manner restriction, and was fundamentally incompatible with First Amendment; even though statute was content-neutral, traffic control

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courts.[96] In that year, both the Sixth Circuit, in *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*,[97] and the Eleventh Circuit, in *Grosz v. City of Miami Beach*,[98] upheld zoning regulations against First Amendment challenges, using different variations of a balancing test that weighed the competing interests of municipal regulation and freedom of religion.[99]

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and safety were significant governmental interests, and ample alternative channels of communication were available for newspaper publisher challenging violation of its right to distribute for sale, statute was not narrowly tailored to serve state's asserted interests''); Southern New Jersey Newspapers v. New Jersey, 542 F. Supp. 173 (D.N.J. 1982) (prohibition of newsracks on major state highways unconstitutional when state could not justify its interests in aesthetics and traffic safety).

96. State courts normally applied a due process analysis, as opposed to a First Amendment inquiry, to these cases. In a majority of jurisdictions, zoning regulations that barred religious institutions from residential areas—the most common form of restriction—were struck down on the ground that such restrictions do not advance the public good. *See, e.g.*, Jewish Reconstructionist Synagogue v. Incorporated Village of Roslyn Harbor, 342 N.E.2d 534 (N.Y. 1975), *cert. denied*, 426 U.S. 950 (1976). *But see* Cornell Univ. v. Bagnardi, 503 N.E.2d 509 (N.Y. 1986). A minority of state courts allow municipalities to exclude religious institutions from residential areas, so long as they are not totally excluded from the community. *See, e.g.*, Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville, 203 P.2d 823 (Cal. Ct. App. 1949).

97. 699 F.2d 303 (6th Cir. 1983).

98. 721 F.2d 729 (11th Cir. 1983).

99. In *Lakewood*, the Sixth Circuit used a two-step inquiry, first evaluating the nature of the religious observance at stake and then the nature of the burden which the municipality sought to place on the religious observance. *See Lakewood*, 699 F.2d at 306. The court found the only burden on religious observance posed by the ordinance was financial: the congregation could worship as it pleased, but was restricted in locating its proposed sanctuary to an area comprising approximately 10% of the city. *See id.* at 307. The court distinguished this minor burden from an ordinance that forced the congregation to forego religious observance through financial or criminal penalties or by placing burdensome taxes on the exercise of religious beliefs. *See id.* Since the court found no restriction of First Amendment rights, it determined that the municipality was free to regulate the location of churches in a reasonable manner to maintain the residential character of certain neighborhoods. *See id.* at 308.

Grosz employed a slightly different analysis, considering two threshold tests before balancing the competing interests of the municipality and the First Amendment. *See Grosz*, 721 F.2d at 733. First, the court asked whether the government sought to regulate religious beliefs or opinions rather than merely placing a burden on religious conduct. While the ''government may never regulate religious beliefs, the [First Amendment] does not prohibit absolutely government regulation [that burdens religious practices].'' *Id.* Second, the ordinance must have both a secular purpose and effect. *Id.* Only if a government regulation passes both of these threshold tests should a court balance the burden on the city's legitimate interests in maintaining its zoning objectives against the burden on the plaintiff's right to free exercise of his religion. *Id.*

In *Grosz*, an elderly Orthodox Jewish rabbi converted his garage into a sanctuary for religious worship and as many as 50 congregants would attend religious services on occasion. *Id.* at 731. Religious uses were not permitted in this zone, but were allowed in at least 50% of the residential zones, including an area four blocks from the rabbi's home. *Id.* at 732. On these facts, the court found that the ordinance passed both threshold tests and that the city's substantial interests in maintaining certain wholly residential

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Since 1983, the majority of federal courts that have considered religious challenges to zoning ordinances have upheld those ordinances, applying either the *Grosz* or *Lakewood* analysis.[100] But in *Islamic Center of Mississippi, Inc. v. City of Starkville*,[101] the Fifth Circuit found that an ordinance, which was applied to deny a special permit for establishment of a mosque at numerous proposed sites, placed more than an incidental burden on the free exercise of religion because it had the effect of forcing a group of relatively impecunious university students to establish their mosque at sites that were reasonably accessible only by automobile.[102] And two federal district court opinions invalidated ordinances that treated religious worship differently than secular "assembly uses."[103]

Most recently, in *Church of Jesus Christ of Latter-Day Saints v. Jefferson County*,[104] a federal district court relied on both *Grosz* and *Islamic Center* to strike down the county's procedure for obtaining a rezoning to allow development of land for churches, which permitted decisions to be determined on the basis of the neighborhood's willingness to accept a church.[105] The court termed this "a thin reed upon

zones free of the noise and crowds associated with religious worship did not unduly burden freedom of religion since more than half the city was available for religious institutions. *Id.* at 738.

100. *See* Christian Gospel Church, Inc. v. San Francisco, 896 F.2d 1221 (9th Cir. 1990) (requirement that church obtain conditional use permit before converting dwelling in single-family residential district to church use); Messiah Baptist Church v. County of Jefferson, 859 F.2d 820 (10th Cir. 1988) (barring construction of church in agricultural zone either as "of right" or by special permit); First Assembly Church of God v. City of Alexandria, 739 F.2d 942 (4th Cir. 1984) (requiring church to comply with fencing, shrubbery, and enrollment restrictions); Cornerstone Bible Church v. City of Hastings, 740 F. Supp. 654 (D. Minn. 1990) (ordinance permitting churches in most residential areas and prohibiting churches in commercial and industrial areas); Congregation Beth Yitzchok v. Town of Ramapo, 593 F. Supp. 655 (S.D.N.Y. 1984) (enforcement of local occupancy and fire safety regulations).

101. 840 F.2d 293 (5th Cir. 1988).

102. *Id.* at 298–99. The court also found that the city did not treat all religious institutions that applied for special exceptions alike (*id.* at 302), and

> has advanced no rational basis other than neighborhood opposition to show why the exception granted all other religious centers was denied the Islamic Center. As the Supreme Court observed in City of Cleburne Living Center, an equal protection case, neighbors' negative attitudes or fears, unsubstantiated by factors properly cognizable in a zoning proceeding, are not a permissible basis [for zoning decisions].

Id. (citing City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985)) (footnote omitted).

103. *See* Love Church v. City of Evanston, 671 F. Supp. 508 (N.D. Ill. 1987); Jehovah's Witnesses Assembly Halls v. City of Jersey City, 597 F. Supp. 972 (D.N.J. 1984).

104. 741 F. Supp. 1522 (N.D. Ala. 1990); *see also* 721 F. Supp. 1212 (N.D. Ala. 1989).

105. 741 F. Supp. at 1530.

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which to base the exercise of religious freedom," and suggested that the answer was to set aside areas zoned for churches as of right or to set solely objective standards for rezonings.[106] In other novel cases, federal courts ruled that the denial of a permit to operate a palmistry and fortune-telling business was arbitrary and capricious because it was based on the impermissible "religious" considerations voiced by neighbors,[107] and struck down an ordinance that required a special permit to operate a day-care center in a single-family residential district, but allowed "nursery schools" to provide day-care services in church buildings without a permit, because it violated the Equal Protection Clause of the Fourteenth Amendment and the Establishment Clause of the First Amendment.[108]

There have also been a number of important recent state court decisions. In *City of Colorado Springs v. Blanche*,[109] the Colorado Supreme Court overruled its 1961 decision in *City of Englewood v. Apostolic Christian Church*,[110] which found an ordinance that required a conditional use permit for churches to locate in single- and two-family districts to be unconstitutional as a blanket exclusion of churches from those districts.[111] In *Colorado Springs*, the court stated that it was joining "the majority of jurisdictions" that make the right of a church to locate in a particular district permissive rather than absolute.[112]

Two Illinois appellate decisions involved regulation of uses associated with religious institutions. In *Bethel Evangelical Lutheran Church v. Village of Morton*,[113] the court used a First Amendment analysis to uphold the imposition of an enrollment cap on a parochial school, arguing that the allowance of an unlimited enrollment would substantially burden the village's interest in safeguarding the residential character of the neighborhood.[114] But in *Our Saviour's Evangelical Lutheran Church v. City of Naperville*,[115] an Illinois appeals court overturned a lower court's ruling upholding the denial of a conditional use permit

106. *Id.* at 1534.
107. Marks v. City of Chesapeake, 883 F.2d 308 (4th Cir. 1989).
108. Cohen v. City of Des Plaines, 742 F. Supp. 458 (N.D. Ill. 1990).
109. 761 P.2d 212 (Colo. 1988).
110. 362 P.2d 172 (Colo. 1961).
111. *Blanche*, 761 P.2d at 216.
112. *Id.* at 216–17; *see id.* at 217 n.5.
113. 559 N.E.2d 533 (Ill. App. Ct. 1990).
114. *Id.* at 536. The court found the enrollment cap constitutional under either the *Grosz* balancing test or the "rational due process approach used in previous Illinois decisions stemming from the standards established in [LaSalle Nat'l Bank v. County of Cook, 145 N.E.2d 65 (Ill. 1957)]." *Id.* at 536–38.
115. 542 N.E.2d 1158 (Ill. App. Ct. 1989).

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for expansion of a church's parking lot.[116] The lower court, finding that the church could not state a claim under the First Amendment, concluded that the denial did not limit the church's free exercise of religion.[117] The appeals court found this to be error.[118] It emphasized that its own precedents had never "suggested that the parking needs of a church should be considered on different principles than those applied to the church building itself,"[119] and that it was not necessary for a church to be able to state a claim under the First Amendment for "the strong presumption of validity accorded to a municipal ordinance [to be] significantly diminished when the impact of a zoning decision in some way limits the free exercise of religion."[120]

An interesting New Jersey decision, *Burlington Assembly of God Church v. Zoning Board*,[121] involved a challenge to the denial of a variance that would have permitted a church to construct a radio transmission tower on its property so the church could operate a radio station as part of its religious mission.[122] The court found that the denial of the variance was an unconstitutional violation of the church's rights to the free exercise of religion and freedom of speech that could not be justified by the township's concerns about safety and possible interference with television, telephone, and radio usage.[123] In other cases, courts in New York and Arizona upheld the application of conditional use permit requirements to operate a religious retreat house in a residential district[124] and a building used to print Bibles.[125]

116. *Id.* at 1161.
117. *Id.* at 1162.
118. *Id.*
119. *Id.*
120. *Id.* at 1161 (citing Family Christian Fellowship v. County of Winnebago, 503 N.E.2d 367 (Ill. Ct. App. 1986)). Based on this analysis, the appeals court ruled that the trial court erred in requiring the church to establish its right to the permit by clear and convincing evidence and found that the church had met its burden of proving that the proposed use met all the standards required by the zoning ordinance. *Id.* at 1162–63.
121. 570 A.2d 495 (N.J. Super. Ct. Law Div. 1989).
122. *Id.* at 496.
123. *Id.* at 497.
124. Province of Meribah Society of Mary, Inc. v. Village of Muttontown, 538 N.Y.S.2d 850 (N.Y. App. Div. 1989). Although the court upheld the requirement that a religious use obtain a special permit, it invalidated a number of conditions that were imposed upon the grant of that permit because "they purport[ed] to regulate the internal operations of the user rather than the use of the land and its effect upon surrounding land." *Id.* at 853.
125. Cochise County v. Broken Arrow Baptist Church, 778 P.2d 1302 (Ariz. Ct. App. 1989).

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B. *Eminent Domain*

Two recent cases have upheld government's use of its eminent domain powers against claims that such action violated the Establishment Clause of the First Amendment.[126] In *Matter of Minneapolis Community Development Agency*,[127] the Supreme Court of Minnesota had little trouble in finding that the inclusion of a YMCA health and recreation facility in a development project, which also involved the condemnation of other properties, did not violate the Establishment Clause.[128] In a more intriguing case, *Southside Fair Housing Committee v. City of New York*,[129] the plaintiffs, a fair housing committee and individual Hispanics, Latinos, and African-Americans, challenged the city's right to sell a square-block parcel in the Williamsburgh section of Brooklyn, acquired through urban renewal in 1967, to a Talmudical Academy associated with the Satmar Hasidim.[130] Plaintiffs argued that the sale violated the Establishment Clause because it had no secular purpose, advanced the religion of Hasidic Judaism, and caused an excessive governmental entanglement with religion.[131]

On the first claim, the plaintiffs did not argue that there could never be a secular purpose when the city sold land acquired through eminent domain to a religious institution; rather, they charged that such a sale to an Hasidic organization could not have a secular purpose because the Hasidim have a dogma and practices that are "exclusionary."[132] The court quickly dismissed this argument, noting that any religious house

126. In addition to these two cases involving Establishment Clause challenges to government's exercise of its eminent domain powers, see Hewitt v. Joyner, 705 F. Supp. 1443 (C.D. Cal. 1989), which involved an unsuccessful Establishment Clause challenge to a county's ownership and maintenance of a park containing numerous sculptures reflecting a religious theme that had been donated to the county by the sculptor.

127. 439 N.W.2d 708 (Minn. 1989).

128. *Id.* at 713.

129. 750 F. Supp. 575 (E.D.N.Y. 1990).

130. *Id.* at 576. The Hasidim are strictly observant Orthodox Jews whose religious tradition was established in the mid-eighteenth century in the western Ukraine by Israel ben Eliezer, a mystic who became known as the Baal Shem Tov (Master of the Good Name). Prior to the Second World War, this movement was centered in the numerous Jewish communities in Eastern Europe and comprised a significant percentage of the total Jewish population. In the wake of the Holocaust, the remnants of these Hasidic communities re-settled in the United States and Israel. The Satmar Hasidim, who are now concentrated in Brooklyn, take their name from the Romanian city of Satu-Mare. ISRAEL RUBIN, SATMAR: AN ISLAND IN THE CITY (1972).

131. *Southside Fair Housing*, 750 F. Supp. at 580. These claims, of course, mirror the standards set out by the Supreme Court for evaluating Establishment Clause challenges in Lemon v. Kurtzman, 403 U.S. 602 (1971).

132. *Southside Fair Housing*, 750 F. Supp. at 580.

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of worship or religious school tends to be largely exclusive in the sense that people who do not share the beliefs or practices of that particular religion choose to exclude themselves,[133] found no merit in the other claims,[134] and ruled in favor of the defendants.[135]

Another recent case, *Yonkers Racing Corp. v. City of Yonkers*,[136] is the first federal case in which a religious organization has challenged the condemnation of its property on the basis of the Free Exercise Clause of the First Amendment. This dispute arose from the efforts of the U.S. Justice Department to enforce the federal Fair Housing Act against the city's forty-year practice of concentrating federally subsidized low-income housing in one section of Yonkers in order to maintain racial segregation.[137] After an extended legal battle,[138] the city entered into a consent decree designating seven public housing sites for 200 units of housing, one of which included a two-acre parcel at the edge of the forty-four acre campus of St. Joseph's Seminary and College.[139] When the Roman Catholic Archdiocese rejected the city's offer to purchase the St. Joseph's property—the reason offered for the rejection by Cardinal O'Connor was his dissatisfaction with the housing plan because it concentrated four of the seven sites in one parish—the federal district court ordered the city to initiate eminent domain proceedings against the seminary, which resulted in the seminary's challenging the condemnation on free exercise grounds.[140]

The district court ruled that the alleged interference with the seminary's First Amendment rights had to be balanced against the need to vindicate the federal constitutional rights of those Yonkers residents who had been denied fair housing and found the inclusion of the seminary site in the consent decree to be essential.[141] On appeal, the Second Circuit ruled that the condemnation could only be justified if it were essential to achieve a compelling state interest and no alternative means

133. *Id.* at 582.
134. *Id.* at 585.
135. *Id.*
136. 858 F.2d 855 (2d Cir. 1988).
137. *See* Spallone v. United States, 110 S. Ct. 625 (1990).
138. *See* United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988); United States v. Yonkers Bd. of Educ., 635 F. Supp. 1577 (S.D.N.Y. 1986) (Housing Remedy Order), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988).
139. *Housing Remedy Order*, 837 F.2d at 1194.
140. *Id.* at 1237.
141. Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855, 861 (2d Cir. 1988).

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of accomplishing the state's compelling interest are available.[142] Finding that the city had steadfastly refused to designate a substitute site for the Seminary property on the ground that there were no "politically acceptable" alternatives,[143] the court stated that "political expediency is far from a compelling reason to force the Seminary to give up its property in derogation of a constitutional right"[144] and remanded the matter to the district court for a plenary hearing to examine the availability of reasonable alternative sites.[145] Ultimately, a substitute site was agreed to.[146]

C. *Historic Preservation*

Three major cases in the past year have considered either federal or state constitutional challenges to the application of historic preservation ordinances to churches. In *First Covenant Church v. City of Seattle*[147] and *Society of Jesus v. Boston Landmarks Commission*,[148] the highest courts in Washington and Massachusetts, respectively, struck down historic preservation ordinances that attempted to regulate church properties; while in *St. Bartholomew's Church v. City of New York*,[149] the challenged historic preservation ordinance was upheld by the Second Circuit. This report will first discuss the *Society of Jesus* case, which differs from the other two in that it involved restrictions on a church's interior, rather than exterior, and was decided on state, rather than federal, constitutional grounds.

The Church of the Immaculate Conception, located in Boston's South End, while one of the "finer examples of classic mid-nineteenth century church design," was also an "aging, oversized building [with] sparse attendance" that the Jesuits planned to renovate into office, counseling, and residential space.[150] When the renovation work began, however, the Boston Landmarks Commission designated portions of the church's

142. *Id.* at 871.
143. *Id.*
144. *Id.* at 872.
145. *Id.*
146. Conversation with Robert Meade, Esq., White Plains, N.Y., attorney for the seminary (1991).
147. 787 P.2d 1352 (Wash. 1990) (en banc), *vacated and remanded*, 111 S. Ct. 1097 (1991).
148. 564 N.E.2d 571 (Mass. 1990).
149. 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1103 (1991).
150. *Society of Jesus*, 564 N.E.2d at 572.

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interior as a landmark.[151] The Jesuits then sought court review of the designation claiming it was invalid on constitutional grounds.[152]

The Jesuits argued that the designation of the interior of the church as a landmark violated provisions in both the federal and state constitutions.[153] Because the Supreme Judicial Court of Massachusetts held that the designation violated Article II of the state constitution,[154] which guarantees freedom of religious belief and practice "subject only to the conditions that the public peace not be disturbed and the religious worship of others not be obstructed," it did not reach the remaining constitutional claims.[155]

The landmark designation violated Article II, the court ruled, because it "restrain[ed] the Jesuits from worshipping 'in the manner and season most agreeable to the dictates of [their] own conscience.' "[156] The court argued that "[t]he configuration of the church interior is so freighted with religious meaning that it must be considered part and parcel of the Jesuits' religious worship."[157] Further, the religious conduct burdened by the designation was not within the narrow exemption in Article II permitting regulation of conduct that disturbs the peace.[158] Finally, the court ruled that the government interest in historic preservation, although worthwhile, was not sufficiently compelling to justify a restraint on the free exercise of religion, concluding that: "[U]nder our hierarchy of constitutional values we must accept the possible loss of historically significant elements of the interior of this church as the price of safeguarding the right of religious freedom."[159]

It is important to note that the *Society of Jesus* court found that

151. *Id.* The designation specifically restricted permanent alteration of the "nave, chancel, vestibule and organ loft on the main floor—the volume, window glazing, architectural detail, finsihes, painting, the organ, and organ case" without the commission's approval. *Id.*

152. *Id.* A short time after filing this appeal, the Jesuits sought commission approval for a revised renovation plan—involving significant changes to the main altar, tabernacles, and altar tables—which was denied. *Id.* They then filed another application for design approval, "calling for screening the main altar rather than removing it," which was ultimately approved. *Id.* These renovations were completed. *Id.*

153. *Id.*

154. Article II provides, in part: "[N]o subject shall be hurt, molested, or restrained in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship." MASS. CONST. art. II.

155. *Society of Jesus*, 564 N.E.2d at 573.

156. *Id.* (quoting MASS. CONST. art. II).

157. *Id.*

158. *Id.*

159. *Id.* at 574.

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landmark designation of the interior *itself*, not the manner in which the landmark regulations were applied to the various proposed renovations, violated the religious freedom of the Jesuits. While *Society of Jesus* involved designation of the church's interior and was decided on state constitutional grounds, in *First Covenant Church v. City of Seattle*,[160] the Supreme Court of Washington came to a similar conclusion in a case involving landmark designation of a church's exterior that was decided under both the federal and state constitutions.

After its designation as a landmark in 1985, the First Covenant Church sued the City of Seattle, seeking a declaratory judgment that landmark designation of churches was unconstitutional and that the enactment of an ordinance specifically designating First Covenant Church as a landmark was void.[161] The trial court held that the landmarks ordinance was properly applied to churches and that until the city took some action under the landmarks ordinance that burdened the church—i.e., something beyond mere designation as a landmark—the church's claim that the landmarks ordinance violated its rights of religious freedom was premature.[162]

The Washington Supreme Court reversed the trial court on both issues. The court first found that the church's claim was ripe for adjudication, largely because the church, having "unsuccessfully appealed the designation decision through numerous administrative procedures set forth in the Landmarks Preservation Ordinance . . . has exhausted its administrative remedies" and there were no further means to challenge the designation other than in the courts.[163]

160. 787 P.2d 1352 (Wash. 1990) (en banc), *vacated* and *remanded*, 111 S. Ct. 1097 (1991).

161. *See id.*

162. *Id.* at 1354.

163. *Id.* at 1356. The Washington court judged the church's claim under the ripeness doctrine developed by the Supreme Court in a 1967 trilogy of cases. *See* Abbott Lab. v. Gardner, 387 U.S. 136 (1967); Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967); Gardner v. Toilet Goods Ass'n, 387 U.S. 167 (1967). Those cases call for a two-part analysis to determine whether a pre-enforcement challenge to an administrative regulation is ripe for judicial review: "first to determine whether the issues tendered are appropriate for judicial resolution, and second to assess the hardship to the parties if judicial relief is denied . . . ." *Toilet Goods Ass'n*, 387 U.S. at 162. The "appropriateness" prong of the test looks to whether the issues raised are primarily legal, and thus do not require further factual development, and whether the challenged action is final. Standard Alaska Prod. Co. v. Schaible, 874 F.2d 624, 627 (9th Cir. 1989). The "hardship" prong requires an evaluation of "the hardship to the parties of withholding [or granting] court consideration." *Abbott Lab.*, 387 U.S. at 149.

The court had little trouble holding that the church's challenge was ripe, resolving the issue in four brief paragraphs. It ruled that the factual record regarding the designation was complete, that the designation ordinance constituted a final action by the landmarks commission, and that the church had exhausted its administrative remedies

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Turning to the substantive claim, the court, relying on the Supreme Court's free exercise decisions prior to *Employment Division, Department of Human Resources v. Smith*,[164] applied a strict scrutiny analysis to the landmark ordinance. It first found that the practical effect of the landmark ordinance was to require a religious organization to seek secular approval of matters potentially affecting the Church's practice of religion and termed the ordinance's "liturgy exception"[165] a "vague and unworkable criterion that fails to accommodate the constitutional rights of the Church and infringes on the Church membership's ability to freely practice its religion."[166] Further, even if the liturgy exception were an appropriate criterion, its requirement that the church submit its plans to a secular body and negotiate possible alternatives "creates unjustified governmental interference in religious matters of the Church

by pursuing its appeal of the designation through procedures provided in the ordinance. *First Covenant*, 787 P.2d at 1356.

This ruling should be contrasted with that of the New York Court of Appeals in Church of St. Paul & St. Andrew v. Barwick, 496 N.E.2d 183 (N.Y. 1986). There, the church sought a declaratory judgment that its designation as a landmark was unconstitutional as a violation of both the Takings Clause of the Fifth Amendment and the Free Exercise Clause of the First Amendment (*id.* at 185); the latter claim being identical to that made in *First Covenant*. The court engaged in an extensive consideration of the ripeness issue in the context of the court's standard for a takings claim by a nonprofit institution designated as a landmark—"whether the Landmarks Law, as applied, prevents or seriously interferes with plaintiff's ability to carry out its charitable purpose." *Id.* at 190 (citing Matter of Society of Ethical Culture v. Spatt, 415 N.E.2d 922 (N.Y. 1980)). The Court concluded that the takings claim was not ripe because its determination would require a "careful examination of facts not yet developed pertaining to" the effect of future landmark commission rulings on the church's rebuilding program. *Id.* at 200.

The court then considered whether its decision on the ripeness issue should be different because the church also based its claim in part on prospective interference with its right to free exercise of religion. *Id.* at 191. Here the court found that the nature of the claimed prospective interference—restrictions on its rebuilding program and "its inability to afford the repair requirements of the [landmarks ordinance]"—was "neither dependent upon nor peculiar to its religious character." *Id.* at 192. In its view, this was wholly insufficient to make the church's claim ripe. *See id.*

164. 110 S. Ct. 1595 (1990).

165. The ordinance stated, in pertinent part:

> [N]othing herein shall prevent any alteration of the exterior when such alterations are necessitated by changes in liturgy, it being understood that the owner is the exclusive authority on liturgy and is the decisive party in determining what architectural changes are appropriate to the liturgy. When alterations necessitated by changes in liturgy are proposed . . . the Board shall issue a Certificate of Approval. Prior to the issuance of any Certificate, however, the Board and owner shall jointly explore such possible alternative design solutions as may be appropriate or necessary to preserve the designated features of the landmark.

Id. at 1360 (quoting SEATTLE, WASH., CITY ORDINANCE § 112425.2 (1985)).

166. *First Covenant*, 787 P.2d at 1360.

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and thereby creates an infringement on the Church's constitutional right of free exercise."[167]

Having found a substantial infringement of the church's right to free exercise of religion, the court next considered whether that interference was justified by a compelling state interest. After noting that landmark preservation laws deal with aesthetic and cultural values, not issues involving the health and safety of citizens,[168] the court discussed the Supreme Court's ruling in *Penn Central Transportation Co. v. New York City*[169] that landmark preservation represented an important state interest and concluded it was "most likely" that the Court would not have found landmark preservation to be a compelling state interest had it been required to analyze the law under strict scrutiny.[170]

Holding that landmark preservation is not a compelling state interest,[171] the Washington court found that the aesthetic and community values associated with landmark preservation were clearly outweighed by the constitutional protection of the free exercise of religion and the public benefits associated with the practice of religious worship within the community.[172]

On March 4, 1991, however, the U.S. Supreme Court, after granting certiorari in this case,[173] vacated the judgment and remanded[174] to the Washington Supreme Court for further consideration in light of *Employment Division, Department of Human Resources v. Smith*.[175] Given that the Supreme Court in *Smith* abandoned the compelling state interest test as the standard for judging free exercise challenges to laws of general application that burden religious practice,[176] the portion of the Washington court's opinion holding that the Seattle ordinance violates the federal constitution[177] is no longer valid. While the Washington court stated that it also found the ordinance violative of the state constitution,[178] it did not cite a single Washington

167. *Id.* at 1361.
168. *Id.*
169. 438 U.S. 104 (1978).
170. *First Covenant*, 787 P.2d at 1361.
171. *Id.*
172. *Id.*
173. Seattle v. First Covenant Church, 111 S. Ct. 1097 (1991).
174. *Id.*
175. 110 S. Ct. 1595 (1990).
176. *See id.* at 1597.
177. *See First Covenant*, 787 P.2d at 1361.
178. *Id.* at 1353. Article 1 of the Washington Constitution provides that "[a]bsolute freedom of conscience in all matters of religious . . . worship . . . shall be guaranteed to every individual." WASH. CONST. art. I, § 11.

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case as authority for using the compelling state interest test, relying entirely on the Supreme Court's cases prior to *Smith*.[179]

On remand, it seems highly unlikely that a majority of the court will hold that the Washington Constitution requires a compelling state interest test in this case. This was a 5-4 decision that featured an unusual concurring opinion authored by Justice Utter, and joined by two other members of the majority, urging the court to adopt the New York "charitable purpose" test[180] as the means for evaluating free exercise claims in future land-use cases.[181] The four dissenting Justices found that the liturgy exception, as interpreted by the city in its own court papers, serves to remove any potential threat to the church's free exercise rights.[182] On this basis they would hold the ordinance does not apply to any changes made to the church for "religious purposes," thus eliminating any First Amendment issue in the case.

On the same day that the Supreme Court vacated the judgment in *First Covenant* and remanded the case to the Washington Court, it denied certiorari in *Rector of the Vestry of St. Bartholomew's Church v. City of New York* (*St. Bart's*),[183] where the Second Circuit, citing *Smith*, upheld the New York Landmarks Law against free exercise and takings claims.[184]

St. Bart's involved a lengthy battle between the New York City Landmarks Commission and a landmarked church located on Park Avenue between 50th and 51st Streets.[185] The church sought commission approval to demolish its seven-story "community house" adjacent to the main church building and erect a fifty-nine story office tower in its place.[186] When this first request was denied as an inappropriate alteration, the church filed a second application, scaling down its proposed tower to forty-seven stories.[187] When this application was also denied, the church filed a third application under a different procedure, commonly known as the "hardship exception," claiming that the commission should issue a certificate of appropriateness for the forty-seven story tower because the community house was inadequate and the

179. *See First Covenant*, 787 P.2d at 1357.
180. *See infra* note 192 and accompanying text.
181. *First Covenant*, 787 P.2d at 1364-65.
182. *Id.* at 1366.
183. 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1103 (1991).
184. *Id.* at 348.
185. *Id.* at 351.
186. *Id.*
187. *Id.*

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church needed the revenues it would obtain from the new building both to maintain its sanctuary and expand its social welfare programs.[188]

After several lengthy public hearings and open executive sessions, the commission denied the application because the church had failed to prove the necessary hardship.[189] The church then filed suit against the commission and the city in federal district court, claiming that the landmarks law, facially and as applied to the church, violates both the Establishment and Free Exercise Clauses of the First Amendment by excessively burdening the practice of religion and entangling the government in religious affairs.[190] It also alleged that the law violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment because it applies different standards to charitable and commercial institutions and constitutes a taking of property without just compensation.[191]

In analyzing the church's takings claim, an issue of first impression in the federal courts, the district court applied the "charitable purpose" standard articulated by the New York state courts: an unconstitutional taking exists "where the landmark designation [of property owned by a charitable organization] would prevent or seriously interfere with the carrying out of the charitable purpose of the institution."[192] The district

188. *Id.* at 351-352.

189. The hardship exception is found in N.Y.C. ADMIN. CODE § 25-309(a)(2)(c) (1985), which states that a certificate of appropriateness shall be granted to a not-for-profit applicant who shows, inter alia, that such "improvement has ceased to be adequate, suitable or appropriate for use for carrying out both (1) the purposes of such owner to which it is devoted and (2) those purposes to which it had been devoted when acquired unless such owner is not [sic] longer engaged in pursuing such purposes." *Id.* at 352 n.1.

190. *Id.* at 352.

191. *Id.* The church also "alleged a variety of procedural due process violations and brought a pendent state law claim alleging that the Church should have been granted a certificate of appropriateness under New York law." *Id.*

192. *Id.* The majority of the few cases claiming that the application of a landmark ordinance to a religious institution constitutes a taking arose in New York and were decided under the standard adopted by the district court in *St. Bart's*. Prior to that decision, no federal court had addressed this issue; however, in Maher v. New Orleans, 371 F. Supp. 653 (E.D. La. 1974), *aff'd*, 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976), the Fifth Circuit, in a case involving a commercial use, established a standard for determining when application of an historic district ordinance would be confiscatory: an ordinance is unconstitutional when it " 'goes so far as to preclude the use of property for any purpose for which it is reasonably adapted.' " *Id.* at 662 (quoting Summers v. City of Glen Cove, 217 N.E.2d 663 (1966)). This standard is satisfied when the claimant proves that sale, rental or renovation of the property is financially impractical. *Maher*, 516 F.2d at 1066.

The *Maher* standard, rather than the New York courts' charitable purpose test, has been applied to religious institutions by at least two state courts. In First Presbyterian Church v. City Council of York, 360 A.2d 257 (Pa. Commw. Ct. 1976), the church had been denied permission to demolish the York House, a building adjacent to the

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court applied the same test to the claim of an unconstitutional burden on religion, observing that "to prevail on either claim plaintiff must prove that it can no longer carry out its religious mission in its existing facilities."[193] Finding that the church could not meet this burden of proof, the district court upheld the commission and city on both claims.[194]

On appeal, the Second Circuit affirmed both of the lower court's rulings,[195] but did not endorse the application of the charitable purpose test to either the takings or free exercise claims.[196] Citing a number of Supreme Court free exercise cases, including *Smith*, which was decided after the district court decision, the court of appeals found that "the Landmarks Law is a valid, neutral law of general applicability" and agreed with the district court that the church failed to prove that it cannot continue its religious practices in its existing facilities.[197] The Second Circuit based its analysis of the takings claim on the Supreme Court's decision in *Penn Central Transportation Co. v. City of New York*:[198] "Applying the *Penn Central* standard to property used for charitable purposes, the constitutional question is whether the land-use regulation impairs the continued operation of the property in its originally expected use."[199] The court answered this question in the negative, concluding "that the Landmarks Law does not effect an unconstitutional taking because the Church can continue its existing charitable and religious activities in its current facilities."[200]

We are left with the question of what these three important cases,

sanctuary, to enlarge its parking facilities. Both the church and the York House were in an historic district. *Id.* at 259. The church sued, claiming that denial of the permit amounted to a taking, and urged the court to apply the charitable purpose test. *Id.* The court chose to rely on *Maher*, however, arguing that *Maher* was the proper test for takings claims in an historic district since the charitable purpose test arose in cases involving individually designated landmarks, and found that the church had failed to carry its burden of proof. *Id.* at 261.

Lafayette Park Baptist Church v. Scott, 553 S.W.2d 856 (Mo. Ct. App. 1977), also involved a church seeking permission to demolish a building within an historic district to expand its parking facilities. As in the *York* case, the court applied the *Maher* test and concluded that the church failed to meet its burden of proof. *See id.* at 863.

193. 914 F.2d at 353.

194. *Id.*

195. *Id.* at 355-56.

196. *Id.*

197. *Id.* at 354-56. In a footnote, the Second Circuit also agreed that the district court had been correct to dismiss the church's claim that the landmarks law violated the Establishment Clause. *Id.* at 356 n.4.

198. 438 U.S. 104, 144 (1978)

199. *St. Bart's*, 914 F.2d at 356.

200. *Id.*

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considered in relation to one another, mean. To start, the Supreme Court, by denying certiorari in *St. Bart's*,[201] which relied on *Smith*, on the same day it vacated the judgment in *First Covenant*, and remanding the case to the Washington Supreme Court in light of *Smith*,[202] has sent two clear signals: first, landmark laws are not suspect under the federal Constitution merely because they apply to churches; and second, a church will not be excused from complying with landmark laws, on federal constitutional grounds, unless it can prove that meeting those requirements leaves it unable to carry out its religious mission.

That still leaves open the question of whether state courts may find greater protection for religious institutions under provisions of their state constitutions. Although the Massachusetts court invalidated the landmark law in *Society of Jesus* on the basis of the state constitution,[203] it is unlikely that case will have broad application for two reasons. First, the case involved landmark designation of the church's *interior*. Few ordinances authorize such designation, likely because landmark commissions recognize that such designations can easily raise significant First Amendment issues.[204] Second, the "free exercise clause" of the Massachusetts Constitution is stated in far broader terms[205] than the corresponding clause in the federal Constitution[206] and has a legislative history that emphasizes its role in guaranteeing freedom of choice as to manner of worship.[207] Thus, while it is true that many state constitutions

201. 111 S. Ct. 1103 (1991).

202. 111 S. Ct. 1097 (1991).

203. Society of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571, 574 (Mass. 1990).

204. In many faiths, the design and arrangement of architectural features and stationary ritual objects within the interior of a sanctuary is rigorously defined by religious rules and/or customs. For example, Orthodox Judaism requires that seating for men be physically separated from seating for women by screening off a women's section or limiting women's seating to a balcony, and customarily places a large "reader's platform" in the center of the sanctuary. Reform and Conservative Judaism do not segregate women and have discarded the central platform. Consider, then, the free exercise challenges that would ensue if either: (1) an Orthodox synagogue, whose interior had been designated as a landmark, were sold to a Reform congregation, which was then denied permission to remove the central platform and the screening from the women's seating area; or, (2) an Orthodox congregation purchases a Reform synagogue with a landmarked interior and is then denied permission to install a central platform and screened off women's section.

205. "[N]o subject shall be hurt, molested, or restrained in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship." MASS. CONST. art. II.

206. "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. CONST. amend. I.

207. *See Society of Jesus*, 564 N.E.2d at 572–73.

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guarantee freedom of religion in terms far broader than those in the First Amendment, few, if any, feature the combination of broadly protective terminology and legislative history found in Massachusetts.[208]

First Covenant, remanded to the Washington Supreme Court for reconsideration in light of *Smith*,[209] is an unlikely candidate to create greater protection for churches under the state constitution. While the Court may well sustain its original judgment because of the particular factual record in this case, a majority of the Justices are already on record as disavowing the notion that mere landmark designation of a church's *exterior* states a constitutional violation under the federal Constitution as it was interpreted prior to *Smith*. Thus, there is little chance that the previous plurality will attract the fifth vote necessary for a majority opinion holding that the state constitution is violated when a church is landmarked.

We can conclude, therefore, that landmark ordinances are now generally safe from First Amendment challenges, so long as they do not seek to regulate the interiors of houses of worship against the wishes of religious institutions and do not totally frustrate the accomplishment of the religious mission of the institution.

VI. Local Regulation of Signs and Billboards

A. *In General*

Though the messages on signs or billboards, whether commercial or noncommercial in content, are forms of speech protected by the First Amendment, the Supreme Court generally has sanctioned local regulations of these land uses. Standards for assessing the constitutionality of sign restrictions are set out in the Supreme Court's opinions in *Metromedia, Inc. v. City of San Diego*[210] and *Members of the City Council v. Taxpayers for Vincent*.[211] Content-neutral and reasonable time, place, and manner restrictions are permissible.[212] For regulation to be valid, it must directly further a sufficiently substantial governmental objective unrelated to the suppression of speech and be no more restric-

208. For example, the parallel provision of the Washington Constitution, which will be construed in *First Covenant* on remand, provides that "[a]bsolute freedom of conscience in all matters of religious . . . worship . . . shall be guaranteed to every individual." WASH. CONST. art. I, § 11.

209. First Covenant Church v. City of Seattle, 787 P.2d 1352 (Wash. 1990) (en banc), *vacated and remanded*, 111 S. Ct. 1097 (1991).

210. 453 U.S. 490 (1981).

211. 466 U.S. 789 (1984).

212. *See Metromedia*, 453 U.S. 490; *Taxpayers v. Vincent*, 466 U.S. 789.

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tive than necessary to achieve the governmental objective.[213] In applying this balancing test, a court also may consider whether the impact of the regulation leaves open ample alternative channels of communication for expression.[214] Generally, courts in recent years, in applying these standards for validity, have upheld a variety of types of local regulation of signs and billboards, including total bans on off-site commercial signs, based on the governmental objectives of traffic safety and aesthetics.[215]

B. *Purpose of Zoning Regulations*

Traffic safety, highway beautification, aesthetics,[216] and elimination of nonconforming signs[217] are substantial governmental interests, but some cases suggest that aesthetic considerations alone are not enough to prevail as a substantial governmental interest.[218] Local zoning regulations must have a specific stated purpose in the portion of the zoning code in question that states a substantial governmental interest, or that purpose must be demonstrated by extrinsic evidence.[219] The purpose cannot be assumed; a general statement in the preamble is not enough to provide a rationale.[220] Also, the Supreme Court of Connecticut ruled that a single purpose does not have to apply to all the area in a municipality to be valid.[221] It said that as long as the means fulfills the purpose, the

213. *Taxpayers for Vincent*, 466 U.S. at 805.

214. *See* Burns v. Barrett, 561 A.2d 1378 (Conn.), *cert. denied*, 110 S. Ct. 563 (1989) (signs and billboards can be used for communication if farther than 500 feet from the highway).

215. *See* Edward H. Ziegler, Jr., *Local Control of Signs and Billboards: An Analysis of Recent Regulatory Efforts*, 8 ZONING & PLAN. L. REP. 161 (1985).

216. *See Burns*, 561 A.2d at 1383.

217. *See* Ackerley Communications of Mass., Inc. v. City of Somerville, 878 F.2d 513, 518 (1st Cir. 1989) (purpose of statute was to reduce the number of nonconforming noncommercial and on-site commercial signs); Circle K Corp. v. City of Mesa, 803 P.2d 457 (Ariz. Ct. App. 1990) (permit for new on-site sign conditioned on removal of non-conforming sign constitutional); *see also* Fort Collins v. Root Outdoor Advertising, 788 P.2d 149 (Colo. 1990).

218. *See Ackerley Communications*, 878 F.2d at 520-21 (aesthetics as an interest underlying a zoning ordinance is proper, but "it [is] highly unlikely that aesthetics ever could be a sufficient justification for a penalty on speech . . . ."); Art Van Furniture, Inc. v. City of Kentwood, 437 N.W.2d 380, 383-84 (Mich. Ct. App. 1989) (plaintiff's burden of proof includes showing that no reasonable governmental interest is being advanced by the zoning ordinance; aesthetics alone, while "a valid part of the general welfare concept . . . may not serve as the sole reason for excluding a legitimate use of property." (citations omitted)) .

219. National Advertising Co. v. Town of Babylon, 900 F.2d 551, 555 (2d Cir. 1990).

220. *See id.*

221. Burns v. Barrett, 561 A.2d 1378, 1383 (Conn.), *cert. denied*, 110 S. Ct. 563 (1989).

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legislature has the discretion to determine where to apply the zoning ordinance and when to grant exceptions.[222]

The statute's purpose, however, is not always controlling. The U.S. District Court for the Northern District of Illinois said that while there may be an explicit purpose stated in the zoning code, the ordinance must be interpreted according to its plain language, even if to interpret it otherwise would be more consistent with the stated purpose.[223] Spot zoning cannot be used to contravene the federal and state governments' intentions.[224] In *L&W Outdoor Advertising Co. v. State of Indiana*,[225] when state and federal law did not allow agricultural land to house billboards, the municipality changed the zoning of land with billboards on it from agricultural to commercial.[226] The court ruled that "local zoning authorities must conform to reality and observe the intent of both the federal and state laws concerning . . . beautification."[227] It is unconstitutional for the purpose of spot zoning to be in contradiction to the state and federal intent; it, therefore, cannot circumvent state and federal law through spot zoning.[228]

C. *Political and Commercial Speech Distinctions*

Courts continue to strike down as unconstitutional ordinances that draw distinctions between commercial and political speech—prohibiting political speech, while permitting commercial speech.[229] Following *Metromedia*,[230] the court in *Able v. Town of Orangetown*[231] found a facially content-neutral ordinance constitutional even though a permit was required to post signs.[232] The plaintiff argued that review of the signs before a permit was granted gave the town officials absolute discretion.[233] The court ruled that "[i]n the absence of unconstitutional appli-

222. *Id.* (regulation applied to highway intersections in municipalities with a population of less than 40,000 residents).
223. Scadron v. City of Des Plaines, 734 F. Supp. 1437, 1443 (N.D. Ill. 1990).
224. *Id.*
225. 539 N.E.2d 497 (Ind. Ct. App. 1989).
226. *Id.* at 498.
227. *Id.* at 499.
228. *Id.*
229. Runyon v. Fasi, No. 90-00752, 1991 U.S. Dist. LEXIS 5311 (D. Haw. Apr. 15, 1991) (ordinance that prohibited all outdoor political signs on both public and private property overbroad and unconstitutional); *see also* National Advertising Co. v. Town of Babylon, 900 F.2d 551 (2d Cir. 1990) (cannot discriminate between commercial and noncommercial speech, favoring commercial speech).
230. Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).
231. 724 F. Supp. 232 (S.D.N.Y. 1989).
232. *Id.* at 234-35.
233. *Id.* at 234.

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cation, an ordinance restricting the posting of signs on the public ways to preserve the aesthetic appeal of the town is within the bounds of the constitution.''[234] Content distinctions are valid if based on on-site and off-site locations as long as noncommercial copy is permitted on any sign that is otherwise allowed and the distinctions are point-of-view neutral.[235] On-site versus off-site[236] distinctions regarding commercial messages are not considered content-based distinctions and are, therefore, permissible.[237] Seemingly content-neutral ordinances can become content-based when they are conditioned on speech made prior to the effective date of the ordinance, not to prospective speech.[238] ''It is without question that the government may not impose a penalty—in this case, denying the right to continue speaking by means of nonconforming signs—because of a person's constitutionally protected past speech . . . The impropriety of distinguishing between speakers in this manner is evidenced by the significant chilling effect that we envision . . . .''[239]

D. *Size, Type, and Manner Restrictions*

1. SIZE

Size restrictions continue to be valid time, place, and manner restrictions.[240] However, these size restrictions must be based on reasonable, rational government objectives. In *Art Van Furniture Inc. v. City of Kentwood*[241] (decided on due process grounds), the city limited a single advertiser to a 100 square foot on-site sign where multiple tenants in the same building would have qualified for signs of 791 square feet.[242]

234. *Id.* at 235.

235. National Advertising Co. v. Village of Downers Grove, 561 N.E.2d 1300 (Ill. App. Ct. 1990).

236. An onsite sign carries a message that bears some

> relationship to the activities conducted on the premises where the sign is located . . . . Depending upon the business or agency, the message on the sign may be deemed either commercial or noncommercial. An offsite sign . . . carries a message unrelated to its particular location. These signs also may display either commercial or noncommercial messages.

Ackerley Communications v. City of Somerville, 878 F.2d 513, 513 n.1 (1st Cir. 1989).

237. *National Advertising Co.*, 561 N.E.2d at 1307.

238. *Ackerley Communications*, 878 F.2d 513.

239. *Id.* at 519.

240. *National Advertising Co.*, 561 N.E.2d at 1308 (''[I]t is [ ] permissible for a municipality to restrict to a greater degree the size of off-site signs it allows. Any disparity between the size of noncommercial off-site and on-site signs is a result of a proper time, place, and manner restriction.'').

241. 437 N.W.2d 380 (Mich. Ct. App. 1989).

242. *Id.* at 384.

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The court ruled that the substantial governmental interests in traffic safety and aesthetics were rationally related to the purpose of the ordinance.[243] However, it is invalid for a municipality to strictly enforce an ordinance that would be "to the detriment of a sole tenant as opposed to multiple tenants"[244] because "[t]he governing rule is one of reason . . . [and] the ordinance is arbitrary, capricious, and unreasonable as applied . . . ."[245]

2. TYPE

Under the standards in *Metromedia*, recent court decisions have upheld the constitutionality of regulations banning all off-site commercial signs, banning all off-site billboards in certain areas and prohibiting the construction of any new off-premises outdoor advertising structure.[246] However, in a recent case, *Bell v. Township of Stafford*,[247] the Supreme Court of New Jersey held unconstitutional a local ordinance totally prohibiting all off-premises advertising signs, including noncommercial signs, within the municipality.[248] Following earlier decisions, the court held that a total municipal-wide ban on all off-premises signs drastically encroached on freedom of speech and expression and that a city's burden in justifying such a ban was particularly strenuous.[249] The New Jersey court found that the city had not shown that the total ban was the least restrictive means available to promote traffic safety and aesthetics[250] and, in any case, there was no adequate showing by the city that alternative means of communication of noncommercial messages were left open by the ordinance.[251]

Since the *Metromedia* decision, regulation banning portable signs but allowing permanent or freestanding signs in the same area has in some cases been upheld by the courts.[252] However, other courts have found

243. *Id.*
244. *Id.* at 385.
245. *Id.* at 384.
246. *See* Burns v. Barrett, 561 A.2d 1378 (Conn. 1989), *cert. denied*, 110 S. Ct. 563 (1989); Naegele Outdoor Advertising, Inc. v. City of Durham, 844 F.2d 172, 174 (1988), *aff'd in unpublished decision*, Major Media of the Southeast, Inc. v. City of Raleigh, No. 89-1571, 1991 U.S. App. LEXIS 5714 (4th Cir. Feb. 8, 1991); Georgia Outdoor Advertising, Inc. v. City of Waynesville, 833 F.2d 43 (4th Cir. 1987).
247. 541 A.2d 692 (N.J. 1988).
248. *Id.* at 693.
249. *Id.* at 698-99.
250. *Id.* at 699.
251. *Id.*
252. *See, e.g.*, Rent-A-Sign v. City of Rockford, 406 N.E.2d 943 (Ill. App. Ct. 1980).

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no reasonable basis for such a distinction based on aesthetics or traffic safety, where freestanding permanent signs are allowed.[253] Two recent federal court decisions have upheld total bans on portable signs displaying commercial or noncommercial messages.[254] Both courts held that great deference should be shown to a local governmental body's decision that such a ban would further the city's interest in curing aesthetic blight.[255]

3. MANNER

Courts have used the public policy of construing statutes strictly to eliminate nonconforming uses to extend the reach of time, place, and manner restrictions. In *Circle K Corp. v. City of Mesa*,[256] the corporation requested a permit for a new on-site sign, without changing the existing nonconforming on-site sign.[257] The municipality refused to issue a permit for the new sign on the removal of the nonconforming sign saying that the new sign was an addition to the property the nonconforming sign was on.[258] The corporation argued that the freestanding, nonconforming on-site sign was not part of the property for which the permit was requested.[259] The court ruled that a municipality may consider on-site signs as inherently connected to the business it advertises;[260] therefore, "any change to any part of the Circle K property could be considered a change to the existing property."[261] Conditions on permits are constitutional as long as they promote a substantial governmental purpose.[262]

E. *Amortization and Grandfather Clauses*

Recent court decisions continue to reject facial "taking" challenges to sign and billboard amortization provisions.[263] However, courts in

253. *See, e.g.*, Dills v. Cobb County, 593 F. Supp. 170 (N.D. Ga. 1984).

254. Lindsay v. City of San Antonio, 821 F.2d 1103 (5th Cir. 1987), *cert. denied*, 484 U.S. 1010 (1988); Don's Porta Signs, Inc. v. City of Clearwater, 829 F.2d 1051 (11th Cir. 1987), *cert. denied*, 485 U.S. 981 (1988).

255. *Lindsay*, 821 F.2d at 1109; *Don's Porta Signs*, 829 F.2d at 1053.

256. 803 P.2d 457 (Ariz. Ct. App. 1990).

257. *Id.* at 459.

258. *Id.* at 460.

259. *Id.*

260. *Id.* at 462.

261. *Id.* at 461.

262. *Id.* at 464.

263. Major Media of the Southeast, Inc. v. City of Raleigh, 792 F.2d 1269 (4th Cir. 1986), *cert. denied*, 479 U.S. 1102 (1987), *aff'd in unpublished decision*, No. 89-1571, 1991 U.S. App. LEXIS 5714 (4th Cir. Apr. 9, 1991) (sign ordinance with five-and-one-half-year amortization period is not a taking because the amortization period allowed a partial recoupment of the owner's investment); Georgia Outdoor

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Pennsylvania and Georgia, relying on state constitutional taking provisions, recently held local ordinance amortization provisions to constitute invalid "takings" of property.[264] The Pennsylvania Superior Court held that a brief ninety-day amortization period for an adult bookstore was unconstitutional under the Pennsylvania Constitution because the owner of the bookstore had a vested right that could not be removed.[265] Similarly, the Georgia Supreme Court found that the Georgia Constitution, which states that private property may not be "taken or damaged for public purposes"[266] was violated when the owners of nonconforming signs were not compensated for the removal of their signs.[267]

In contrast, the First Circuit Court of Appeals, in *Ackerley Communications of Massachusetts, Inc. v. City of Somerville*,[268] invalidated a zoning ordinance based on the First Amendment of the U.S. Constitution without reaching the takings issue.[269] The City of Somerville created an ordinance that grandfathered all on-site nonconforming signs carrying both commercial and noncommercial messages, and all nonconforming off-site commercial signs that carried noncommercial messages.[270] Ackerley Communications requested a variance for its commercial off-site signs, and when it appeared the variance would be denied, announced it would change all its nonconforming commercial signs to nonconforming noncommercial signs and, thus, qualify for the grandfather provision in the ordinance.[271] In reaction to this announcement, the City of Somerville changed the ordinance to require that all nonconforming off-site signs, in order to qualify for the grandfather provision, had to have contained exclusively noncommercial messages for the previous year.[272] This provision allowed approximately seven of Ackerley's approximately 200 signs to qualify for the grandfather provision.[273]

Advertising v. City of Waynesville, 900 F.2d 783 (4th Cir. 1990) (presence of amortization clause does not establish the validity of an ordinance as a matter of law, but the absence of an amortization provision does not constitute an automatic taking); *see also* Naegele Outdoor Advertising Co. v. City of Durham, 844 F.2d 172 (4th Cir. 1988).

264. PA Northwestern Distrib., Inc. v. Zoning Hearing Bd., 584 A.2d 1372 (Pa. 1991); Lamar Advertising v. City of Albany, 389 S.E.2d 216 (Ga. 1990).

265. *PA Northwestern*, 584 A.2d 1372 (Pa. 1991).

266. GA. CONST. art. 1, § 3, ¶ I(a).

267. *Lamar Advertising*, 389 S.E.2d at 217–18.

268. 878 F.2d 513 (1st Cir. 1989).

269. *Id.* at 522.

270. For a definition of on-site and off-site, *see supra* note 236.

271. *Ackerly Communications*, 878 F.2d at 514–15.

272. *Id.* at 515.

273. *Id.*

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The court ruled that, even though in some instances it may be permissible to regulate content,[274] in this instance the regulation violated the First Amendment.[275] While the ordinance passed *Metromedia* because it allowed noncommercial speech anywhere and in addition to commercial speech, it failed because it penalized speakers for their past lawful speech.[276] "[T]he issue is whether a severe penalty—a prohibition against future speech—may be imposed on a speaker because he in the past engaged in a certain kind of lawful but less favored speech. We conclude that the First Amendment does not permit this particular discrimination."[277] The court envisioned that by allowing the city to select who will speak based on past constitutional speech, there would be an overwhelming chilling effect on prospective speech.[278]

Second, the court stated that while time, place, and manner restrictions present a mechanism for restricting future speech, that speech must always be prospective.[279] The amortization clause in the Somerville ordinance based the determination of who could speak on past lawful speech without notifying the speaker that he would be penalized for the lawful speech.[280] The court ruled that "Ackerley deserved notice that a consequence of the decision to speak on less important, though *constitutionally protected* subjects, would be the loss of its right ever to display on its nonconforming signs the most highly valued messages."[281] Somerville's purpose for imposing this grandfather provision was to severely restrict nonconforming billboards.[282] The court held, however, that the grandfather clause was not a rational means of attaining the purpose and that there were several less restrictive alternatives available.[283]

274. *Id.* at 518 n.9.
275. *Id.* at 518.
276. *Id.* at 518–19.
277. *Id.* at 518.
278. *Id.* at 519–20.
279. *Id.* at 520.
280. *Id.* at 520–21.
281. *Id.* at 521–22.
282. *Id.* at 522.
283. *Id.*

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